

Editor's Notes: The exhibits (160 IBLA 260A through 260C, below) were not paginated in the original decision; Erratum dated January 22, 2004, (attached to this decision as 160 IBLA 260D) was issued to add five lines at the top of page 243 that were dropped from the text of the opinion in the course of processing the decision.

JERRY D. GROVER D.B.A. KINGSTON RUST DEVELOPMENT
(GROVER III)

IBLA 99-8, 99-9, 99-11, 99-12

Decided December 22, 2003

Consolidated appeals from decisions of the Utah State Office, Bureau of Land Management, declaring oil shale mining claims forfeited in whole or in part for failure to pay maintenance fees and informing claimant that BLM lacks jurisdiction over portions of claims located on lands conveyed to the State of Utah, and also declaring claims null and void ab initio. UMC 115424, et al.; UMC 115432, et al.; UMC 115763, et al. (UT-932-0A); and UMC 115452.

Decisions in IBLA 99-8 and IBLA 99-9 affirmed; de novo review authority exercised in IBLA 99-11 and IBLA 99-12; decisions in IBLA 99-11 and IBLA 99-12 affirmed as modified.

1. Administrative Authority: Generally--Administrative Procedure:
Generally--Administrative Procedure: Administrative Review--
Administrative Procedure: Administrative Record

Where BLM admits that the stated rationale of a decision appealed is incorrect and requests the Board to exercise its de novo review authority to affirm the result of BLM's decision on a different basis, the Board typically will reverse or vacate the decision and remand the case so that a new decision can be issued by BLM. No remand is necessary where the appellant did not object to BLM's request, filed a reply and surreply responding to BLM's alternative rationale in these appeals, and has fully briefed the merits of such alternative rationale in other pending appeals. Appellant is not prejudiced by granting BLM's request for de novo review, and no purpose would be served by remanding the cases. In such circumstances, the Board properly invokes its de novo review authority.

2. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

Subsection (d) of the Energy Policy Act, 30 U.S.C. § 242(d) (2000), provides a procedural mechanism for formally ascertaining and resolving the status of oil shale mining claims. In establishing opportunities to affirmatively declare one's intentions, it does not abolish the basic necessity of maintaining a claim in conformity with the law until patent issues. That necessity extends to and includes the two-year period allowed for the filing of an application for limited patent.

3. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

All persons who hold unpatented mining claims do so by timely fulfilling the requirements of relevant law necessary to maintain the claims. The phrase "maintains or elects to maintain unpatented claims" in subsection (d) of the Energy Policy Act is structured to reflect the elective aspects of the law, but does not negate the fundamental necessity of complying with the mining law and with sec. 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (2000), as amended by the Energy Policy Act with respect to oil shale claims, to maintain one's possessory right as against the United States, nor does it create an exemption to that obligation. Oil shale mining claims for which an election to proceed to limited patent has been filed must be maintained until such time as patent may be issued, including during the 2-year period before the deadline for filing the application expires.

4. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

Oil shale claim holders subject to subsection (c) (3) or (d) of the Energy Policy Act are required to maintain their claims by complying with the mining law as amended by

that Act, which terminated the obligation to perform annual labor and now requires those oil shale claimants to pay a fee of \$550 per claim per year to maintain their claims.

5. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

In enacting the Energy Policy Act, Congress established an affirmative obligation to pay \$550 per year per oil shale claim to maintain such claims, a default in which subjects the claims to voidance. Congress did not mandate the conclusive, self-executing forfeiture by operation of law that attends failure to timely file a notice of election, failure to timely apply for limited patent or failure to timely notify the Department in writing of a subsequent election to maintain a claim. Instead, BLM properly provides notice of the failure to comply with the Energy Policy Act and a reasonable opportunity to resolve such failure before it can issue a final decision determining that a claim is null and void.

6. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

The Energy Policy Act's oil shale maintenance fee of "\$550 per claim per year" is not merely a matter of convenience. It is instead a substantive matter essential to maintaining the possessory right to an oil shale claim as against the United States, and payment of the fee is mandatory.

7. Administrative Procedure: Decisions--Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

When no stay of BLM's decisions voiding unpatented oil shale mining claims pursuant to the Energy Policy Act was sought or granted, they were effective as of the close of the appeal period, and in accordance with the decisions,

those mining claims were void and ceased to exist. In that circumstance, payment of yearly claim fees while the appeals were pending before this Board would be directly contrary to, and inconsistent with, the voidance decisions.

8. Administrative Authority: Generally--Administrative Procedure: Decisions--Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

When a decision declaring unpatented oil shale claims null and void pursuant to the Energy Policy Act is reversed by this Board, the claims are restored to the claim holder *nunc pro tunc*, as if the decision had never been issued. Upon reinstatement of the oil shale claims, the obligation to maintain them as provided by the Energy Policy Act is also revived, including the obligation to pay the maintenance fees "per claim per year" for each year of the claim's existence.

9. Administrative Authority: Generally--Administrative Procedure: Decisions--Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

Because the Energy Policy Act does not expressly provide for automatic forfeiture or conclusive abandonment of an oil shale claim for failure to comply with a mandatory requirement, the appropriate course of action is to provide a party an opportunity to comply with that Act. Where a party fails or refuses to come into compliance after receiving notice of maintenance fees that are due, BLM properly may declare such oil shale claims null and void.

APPEARANCES: Jerry D. Grover, Jr., Provo, Utah, pro se; John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

In IBLA 99-8, Jerry D. Grover d.b.a. Kingston Rust Development (Grover) has appealed an August 31, 1998, amended decision ^{1/} of the Utah State Office, Bureau of Land Management (BLM), declaring numerous oil shale mining claims forfeited for failure to pay the claim maintenance fee of \$550 per oil shale claim, after notice and an opportunity to do so. ^{2/} (Decision at 2.) The decision was issued to Production Industries Corp. (PIC), Grover's predecessor in interest. ^{3/} All of the oil shale claims

^{1/} The decision initially was issued on Aug. 28, 1998. Exhibit A to that decision listed the 156 oil shale claims involved, UMC 115424 through 115837. In particular, Exhibit A listed two claims as UMC 11451 and UMC 116646, but the correct serial numbers are UMC 115451 and UMC 115646, respectively. The Aug. 31, 1998, amended decision merely corrected those typographical errors. The corrected Exhibit A was attached. The corrected Exhibit A is appended to this opinion, although we have added the IBLA docket number as a caption. BLM's Aug. 31 and Aug. 28 decisions are otherwise identical.

^{2/} Most of the claims in these appeals are among the 274 claims that were before the Board in Production Industries Corp., 138 IBLA 183 (1997), in which we considered the sufficiency of a notice of election to proceed to limited patent filed by the company pursuant to the Energy Policy Act of 1992 (EPA), 30 U.S.C. § 242 (2000), and whether the claims could be forfeited automatically by reason of a defect in the notice of election. We determined that no particular form or content for an election was required by the Act. We also concluded that a deficiency in form or content was curable, and accordingly, reversed BLM's decision declaring the claims abandoned by operation of law.

^{3/} Grover succeeded to PIC's interest in the claims on Dec. 14, 1994, as evidenced by a quitclaim deed recorded in the Covington and Uinta, Utah, County Records on Apr. 16 and 27, 1997, respectively. The recording of the quitclaim deed does not dispense with the need to comply with the requirements of 43 CFR 3833.3. That regulation establishes the means by which BLM is to be officially notified of transfers of mining claims. Grover did not comply with the regulation, however. When a claimant fails to do so, BLM will refuse "to recognize the interest acquired by the transferee or to serve notice of any action, decision, or contest on the unrecorded owner." 43 CFR 3833.4(c). Thus, BLM's decisions were addressed to PIC, the record owner of the claims. In the past, this Board has held such deficiencies to be of a curable nature, but Grover fails or refuses to comply with 43 CFR 3833.3 at his own peril, and he will not be heard to complain of lack of notice that is avoided simply by complying with the regulation.

at issue in this appeal are unpatented mining claims for which patent applications have not been filed.^{4/} (Decision at 1.)

In IBLA 99-9, Grover has appealed an August 28, 1998, decision in which BLM determined that portions of the Apache No. 9 (UMC 115432), Victor No. 5 (UMC 115443), American No. 9 (UMC 115453), Walters Claim #6 (UMC 115461), Provo No. 9 (UMC 115510), Provo No. 10 (UMC 115511), and Liberty No. 5 (UMC 115820) oil shale mining claims had been transferred out of Federal ownership by State Selections 3 and 8 and issuance of State patents 43-64-0031 (UMC 115453) and 43-64-0062 (UMC 115443). Those transfers thus deprived BLM of jurisdiction to take any action with respect to such lands.^{5/} To the extent the oil shale claims were embraced by these conveyances to the State, they were declared null and void ab initio. To the extent that portions of the claims remained in Federal ownership, the decision declared them forfeited for failure to pay the claim maintenance fee of \$550, after written notice and opportunity to do so.

As the decisions in IBLA 99-8 and 99-9 recite, after the Board's reversal of BLM's decision in Production Industries Corp., 138 IBLA 183, BLM sent a decision to PIC voiding the oil shale claims for failure to pay the \$550 maintenance fee per claim for fiscal years 1993 through 1996, and Grover filed an appeal to this Board, which was docketed as IBLA 97-327. BLM subsequently determined that it had failed to follow the procedure set forth in BLM Instruction Memorandum (IM) No. 98-01.^{6/} Among other things, IM 98-01 directed BLM to refuse to accept maintenance fee payments during the pendency of an appeal of a forfeiture decision unless it was stayed. It also stated that if a decision that was not stayed ultimately was reversed, BLM was to afford the claimant notice and an opportunity "to pay the annual fees." BLM therefore requested that the Board remand the case docketed as IBLA 97-327, and on December 15, 1997, we vacated the decision and remanded the matter to BLM. On March 4, 1998, BLM gave PIC 30 days in which to pay accrued fees for the mining claims, and when neither PIC nor Grover did so, issued the August 28 and 31, 1998, decisions now before us.

^{4/} The running of the 2-year period for filing an application for limited patent has been tolled while these appeals were pending.

^{5/} The claims and acreage involved in IBLA 99-9 were fully identified an Exhibit A appended to BLM's decision. That list is reproduced and appended to this opinion, except that we have added the Board's docket number as a caption.

^{6/} By its terms, IM 98-01 dated Sept. 29, 1997, expired on Sept. 30, 1999. By IM 2000-30 dated Nov. 10, 1999, IM 98-01, among others, was extended to Sept. 30, 2001. It is unclear whether it has since been further extended, but given the analysis set forth in this opinion, it is not necessary to resolve the current status of that IM.

In IBLA 99-11, Grover has appealed the August 28, 1998, decision of BLM declaring the Provo Placers 11 and 12 (UMC 115763 and 115764), Provo Placer 17 (UMC 115769), and Provo Placers 20 through 24 (UMC 115772 through 115775) null and void ab initio because they are located on land transferred to the State of Utah on August 10, 1905.^{7/}

Similarly, in IBLA 99-12, Grover has appealed BLM's August 28, 1998, decision declaring UMC 115452 null and void ab initio because the land embraced by that claim had in part been transferred to the State of Utah on August 10, 1905.^{8/}

I. Preliminary Matters

In its Answers, BLM requested that the Board consolidate these four appeals on the ground that the facts, arguments, and legal issues were sufficiently similar to warrant doing so. Grover did not object to the request, and accordingly, the four appeals are consolidated and considered together.

One other matter requires our attention before we turn to the merits. On February 26, 1999, BLM filed Answers in IBLA 99-11 and 99-12, in which it concedes error in asserting that the subject public lands had been conveyed to the State. BLM invokes this Board's de novo review authority and asks that we modify the basis for its decision and affirm its conclusion that the claims are forfeited. (Answer in IBLA 99-11 at 2.) To support this request, BLM states that these claims have the same procedural history; they all involve the EPA, 30 U.S.C. § 242 (2000); the parties have filed substantially the same pleadings in these four appeals; all involve BLM's contention that Grover's oil shale claims are subject to the \$550 yearly claim fee imposed by the EPA; and, although the cases do present certain factual differences, such differences are relatively minor and do not alter the parties' contentions or reasoning. BLM therefore urges the Board to invoke its "authority to declare the claims forfeited in the first instance." (Answer in IBLA 99-11 at 6.)

When a timely appeal subjects a BLM decision to this Board's jurisdiction, our review authority is de novo in scope because it is our delegated responsibility to decide for the Department "as fully and finally as might the Secretary" appeals

^{7/} The claims in IBLA 99-11 were identified an Exhibit A appended to BLM's decision. That list is reproduced and appended to this opinion, except that we have added the Board's docket number.

^{8/} According to the decision, the mining claims on Lots 2 and 3 and the S½ N½ NE¼ of Sec. 2, T. 7 S., R. 7 W., Uintah Special Meridian, were null and void ab initio. The land subsequently was reconveyed to the United States "beginning in 1920." (Decision at 1.)

regarding use and disposition of the public lands and their resources. 43 CFR 4.1; Richard Barga, 117 IBLA 239, 245 n.3 (1991); United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). The Board's authority to correct or reverse an erroneous decision by the Secretary's subordinates or predecessors in interest and to decide cases on the basis of issues other than those advanced by parties has been judicially recognized. Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); see also Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); Ben Cohen (On Judicial Remand), 103 IBLA 316, 328-29, aff'd sub nom., Sahni v. Watt, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), aff'd (Jan. 14, 1991), aff'd, No. 91-15398 (9th Cir. Apr. 27, 1992) (disposition of a land selection application on a basis other than that for which the case was remanded); Kelly E. Hughes, 135 IBLA 130, 136 (1996); Exxon Company, U.S.A., 15 IBLA 345, 353 (1974). Moreover, the Board's authority has been deemed sufficiently broad so as to allow it to take notice of official records of the Department on appeal which were not noted by an Administrative Law Judge in the initial consideration of the case, Briggs v. BLM, 99 IBLA 137, 142 (1987), as well as to take cognizance of evidence submitted for the first time on appeal. W&T Offshore, Inc., 148 IBLA 323, 359 (1999).

[1] The Board nonetheless strives not to replace BLM as the initial decision maker, and where BLM admits that the stated rationale of the decision appealed is incorrect, the more typical result would be to reverse the decision or vacate and remand the case so that BLM could issue a new decision that would be appealable to this Board. This is because the recipient of a decision is entitled to a reasoned and factual explanation of the rationale for the decision, and must be provided an adequate basis for understanding and accepting it or disputing and appealing it. Further, the basis for that decision must be stated in the written decision and demonstrated by the administrative record. Nevada Division of Wildlife v. BLM, 145 IBLA 237, 247 (1998); Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990); Exxon Co., U.S.A., 113 IBLA 199, 205 (1990); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983).

However, we have held that, where the appellant is able to surmount any difficulty initially encountered after BLM fails to present an adequate explanation of the basis for its decision, presents an informed and organized appeal, and is not unduly prejudiced by BLM's initial omission, no remand is necessary. Nevada Division of Wildlife v. BLM, 145 IBLA at 237. The Statements of Reasons (SORs) Grover filed in IBLA 99-11 and 99-12 responded to the stated basis of the decisions by disputing the assertion that the United States no longer owned the land. When BLM's Answers squarely renounced the stated decision rationale, however, and moved the Board to exercise de novo review authority and affirm the forfeiture on a different ground, Grover filed a 19-page reply and a 5-page surreply in which he raised no objection to the request, and indeed, fully argued the merits of the asserted

applicability of the EPA to the claims in IBLA 99-11 and 99-12. In fact, as BLM notes, Grover's arguments are virtually identical to those posited in IBLA 99-8 and 99-9. Grover clearly is neither surprised nor prejudiced by our granting BLM's unopposed request. Under the circumstances, we see no point in remanding these cases, and instead will exercise our de novo review authority to determine whether the record supports the result of BLM's decision, *i.e.*, that the claims are void. See Nevada Division of Wildlife v. BLM, 145 IBLA at 237; Ronald A. Pene, 147 IBLA 153, 159 n. 7 (1999).

These appeals, the next in a series of appeals by Grover or PIC,^{9/} require us to further construe the EPA, Pub. L. No. 102-486, Title XXV, sec. 2511, 106 Stat. 3109, codified at 30 U.S.C. § 242 (2000). We accordingly begin with that statute, which provides the following, in material part:

II. The Energy Policy Act of 1992

(c) **Patent**

(1) Notwithstanding any other provision of law, the holder of a valid oil shale mining claim who has filed a patent application which has been accepted for processing by the Department of the Interior by October 24, 1992, but has not received first half final certificate for patent by October 24, 1992, may receive only a patent limited to the oil shale and associated minerals, upon payment of \$2.50 per acre. * * *

(2) Maintenance of claims referred to in this subsection prior to patent issuance shall be in accordance with the requirements of applicable law prior to enactment of this Act.

(3) Any holder of a valid oil shale mining claim referred to in this subsection may maintain such claim in accordance with the requirements set forth in subsection (e) (2) of this section in lieu of receiving a patent under this section.

(4) * * * * *

^{9/} These are: Jerry Grover d.b.a. Kingston Rust Development (Grover II), 141 IBLA 321 (1997); Jerry D. Grover d.b.a. Kingston Rust Development (Grover I), 139 IBLA 178 (1997); and Production Industries Corp., 138 IBLA at 183.

(d) Election

(1) Notwithstanding any other provision of law, within 180 days from the date of which the Secretary provided notice under subsection (a) of this section, a holder of a valid oil shale mining claim for which a patent application was not filed and accepted for processing by the Department of the Interior prior to October 24, 1992, shall file with the Secretary a notice of election to—

(A) proceed to limited patent as provided in subsection (e) (1) of this section; or

(B) maintain the unpatented claim as provided for in subsection (e) (2) of this section.

(2) Failure to file the notice of election as required by paragraph (1) shall be deemed conclusively to constitute an abandonment of the claim by operation of law.

(3) Any claim holder who elects to proceed under paragraph (1) (A) must apply for a patent within 2 years from the date of election or notify the Secretary in writing prior to expiration of the 2-year period of a decision to maintain such claim as provided in paragraph (1) (B) or such claim shall be deemed conclusively to have been abandoned by operation of law.

(4) The provisions of this subsection shall be in addition to the requirements of section 1744 of Title 43 [mandatory filings required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (2000)].

(e) Effect of election

(1) * * * * *

(2) Notwithstanding any other provision of law, a claim holder referred to in subsection (c) of this section or a claim holder subject to the election requirements of subsection (d) of this section who maintains or elects to maintain an unpatented claim shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this section, except that the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary \$550 per claim per year for deposit as

miscellaneous receipts in the general fund of the Treasury commencing with calendar year 1993.

30 U.S.C. § 242 (2000). ^{10/}

III. Arguments of the Parties

Grover makes six arguments in all four appeals: ^{11/}

(1) Assuming that a \$550 maintenance fee per claim is legitimately due, there was no requirement to pay fees during the pendency of the appeal, because until BLM's decision was reversed, the legal status of the claims was that they were null and void (SOR at 1-4);

(2) He did not receive the required notice of the Act's provisions (SOR at 4-5);

(3) Failure to pay the \$550 fee per oil shale claim does not result in abandonment or forfeiture of the claim (SOR at 5-6);

(4) This Board has ruled that applicable regulations do not impose the consequence of abandonment or forfeiture for failure to pay the maintenance fees established by the EPA (SOR at 6-7);

(5) The \$550 fee does not, in any case, apply to claims proceeding to limited patent (SOR at 7-8); and

(6) IM No. 98-01 does not apply to oil shale claims (SOR at 8-9).

^{10/} Provisions identical to those in section 2511(e) appeared in section 6 of S. 30, 101st Cong., 2nd Sess. (1990) and H.R. 2392, 101st Cong., 2nd Sess. (1990). The EPA is the enacted version of H.R. 776, 102nd Cong. 2nd Sess. (1992). The text and legislative history for those bills appears in two Senate Reports, S. Rep. No. 101-259 (1990) and S. Rep. No. 101-260 (1990).

^{11/} With respect to the appeals in IBLA 99-11 and 99-12, as stated, Grover's SOR had controverted BLM's assertion that the public lands on which the claims are located had been conveyed, in whole or in part, to the State of Utah. Having granted BLM's request to exercise our de novo review authority and adjudicate the correctness of the decisions based on the applicability of the EPA, the six arguments now pertain equally to IBLA 99-11 and 99-12.

In addition, with respect to IBLA 99-9, Grover concedes the correctness of the finding that BLM now lacks jurisdiction over the land embraced by UMC 115461, 115510, and 115820, but with respect to UMC 115432, 115443, and 115453, contends that BLM's location and legal descriptions are not correct. He has submitted amended location notices to support this argument. (SOR in IBLA 99-9 at 8.)

BLM responds to these arguments in the order presented, contending:

(1) The administrative appeal regulations do not "permanently excuse compliance with the EPA's \$550 fee requirements" (Answer at 4-7);

(2) This Board has ruled that appellant received notice of the EPA, and in any event, Grover has failed to comply with the provisions of 43 CFR 3833.3(a), which require a transferee of an interest in an unpatented mining claim to provide notice to BLM, failing in which BLM properly refuses to recognize the transfer or serve notice of any action, decision, or contest on the unrecorded owner (Answer at 7-12);

(3) The EPA incorporates prior existing law, the effect of which is to subject oil shale claims to abandonment and avoidance when maintenance fees are not paid (Answer at 12-14);

(4) The regulations at 43 CFR 3833.4(a)(2) and 3833.1-5 (1997) properly specify forfeiture as the consequence of failing to pay the \$550 claim maintenance fee (Answer at 14-16), and "the characterization of fees as 'maintenance' or 'rental' should be inconsequential" (Answer at 14-16);

(5) The EPA requires all claimants subject to 30 U.S.C. § 242(d) to pay the yearly fees (Answer at 17-22); and

(6) IM 98-01 is irrelevant to this appeal, but nevertheless may be extended to oil shale claims (Answer at 22-23).

As to the sufficiency of BLM's legal descriptions for the three claims that remain at issue in IBLA 99-9, BLM notes that the amended location notices have never been submitted to BLM with the requisite service fee, and thus it has not had the opportunity to assess Grover's contention. BLM nonetheless asserts that the basis for its legal descriptions is a 7.5 minute topographical map, and further notes that Grover's argument is not supported by any countervailing evidence. (Answer in IBLA 99-9 at 6-7.)

The first of Grover's arguments, that there was no requirement to pay fees during the pendency of the appeal docketed as IBLA 97-327, is well-founded, but is

better treated in connection with his sixth argument pertaining to the applicability of IM 98-01, and we postpone that discussion accordingly.

Grover's second argument can be dealt with summarily. The assertion that BLM's decisions should be invalidated on the ground that he did not receive notice of the EPA's requirements is spurious. Appellant successfully argued the particulars of the Act before this Board in Grover I and II, *supra*. Moreover, quite apart from his obvious familiarity with the Act's substantive requirements, any conceivable question regarding the sufficiency of notice was cured when Grover received actual notice of the EPA's requirements from BLM and from this Board as a consequence of our decisions in Grover I and II.^{12/}

The parties' third, fourth and fifth arguments, whether and to what extent the \$550 fee specified by the EPA applies to Grover's claims, and whether and in what circumstances the claims can be abandoned, forfeited, or otherwise lost are best considered together. As stated, BLM contends that, by advertence to compliance with the general mining law, Congress has expressed its intention to subject oil shale mining claims to the consequence of forfeiture. This necessitates a brief description of the statutory context in which the EPA was enacted.

^{12/} BLM challenges the decision in Grover II, 141 IBLA at 323-24, insofar as we turned to the provisions of 43 CFR 3833.5(d) (1992) for guidance in determining who should receive the critical notice of the EPA's requirements that would then trigger the obligation to elect a claim status within 180 days to avoid forfeiture of the claims. (See Answer in IBLA 99-11 at 13-14.) In Grover II, Grover had submitted the deed by which he acquired an 80-percent interest in the Wyoming claims there at issue, and BLM had received a copy of that deed mere days after sending notice to PIC, and scant days before the statutory deadline for sending notice to all claim holders was to expire. Given BLM's actual knowledge of Grover's status as a claim holder, the presumed abandonment specified by the EPA for failing to act after notice, and the lack of regulations in this virginal phase of implementing a new statute, we concluded that "BLM was bound to notify every claim holder of an oil shale claim of whose existence it became aware before the December 23, 1992, deadline." 141 IBLA at 324. Our phrasing ("We reject BLM's argument that 43 C.F.R. § 3833.5 (1992) should not apply here because BLM sent a notice to PIC * * *") was hardly tantamount to a ruling that a mining claimant need not comply with the regulations governing notice of transfer, and we expressly disavow any such conclusion or inference. See also n. 3 *ante*.

IV. Statutory Background for the Analysis

A. The Mining Law of 1872

Placer claims are subject to entry and patent in the same manner as lode claims. 30 U.S.C. § 35 (2000). Oil shale was made subject to location and entry as a placer claim by the Act of February 11, 1897, 29 Stat. 526. The Mining Law of 1872 (mining law) called for the annual expenditure of \$100 worth of labor or improvements, also referred to as “assessment work,” on or for the benefit of a mining claim each year until patent issued. 30 U.S.C. § 28 (2000). The purpose of the assessment work requirement was “to assure the claimant’s good faith and diligence, to encourage development of the west’s mineral resources, and to prevent a claimant from locating numerous mining claims and holding the claims without working them, thus preventing others from occupying and developing the property.” 2 American Law of Mining § 45.02 (2d ed. 2002) .

However, the mining law also provided that failure to comply with assessment work and other conditions would open the claim to relocation, assuming the claim holder had not resumed work on the claim before the relocation occurred. 30 U.S.C. § 28 (2000). Thus, failure to perform assessment work did not result in automatic forfeiture and restoration to the public domain, or even subject it to invalidation by the United States, it merely opened the claim to relocation before work resumed. Only abandonment restored the claim to the public domain, and only a relocation by an adverse claimant caused forfeiture, a matter that could be raised only in the courts by rival claimants. 2 American Law of Mining § 45.08[2][a] (2d ed. 2002) and cases cited.

Oil shale deposits were withdrawn from location under the mining law by section 37 of the Mineral Leasing Act of 1920 (MLA), and thereafter became subject to disposition only by leasing, 30 U.S.C. § 193; see also 30 U.S.C. § 241 (a) (2000). The MLA preserved “valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.” 30 U.S.C. § 193 (2000) (emphasis added). Since oil shale no longer was a locatable mineral, such claims were no longer vulnerable to relocation by rival claimants. The Supreme Court in Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 317-18 (1930), and Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, 646-47 (1935), firmly established that failure to perform annual assessment did not *ipso facto* result in forfeiture to the United States, and that the United States lacked the authority to challenge oil shale claims on that basis.

In 1970, the Supreme Court clarified and substantially retreated from the construction set forth in Wilbur and Ickes. In Hickel v. Oil Shale Corp., 400 U.S. 48

(1970), the Supreme Court examined the legislative history of the mining law and the MLA's savings clause and concluded that "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the [MLA]." *Id.* at 57. Confining Krushnic and Ickes to situations in which the claim holders had substantially complied with the assessment work requirement, the Court held that "§ 37 of the MLA makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise," and that the Department has subject matter jurisdiction to determine whether such claims have been maintained by performance of annual labor. *Id.*; see also 2 American Law of Mining (2d Ed.) §§ 45.08[2][a] - 45.09[4]. In 1972, the Department promulgated 43 CFR 3851.3(a) and (b) ^{13/} to adopt the principles established by Hickel, and since then, the Department's view that an unpatented mining claim could be declared void for failure to perform annual assessment work has been firmly established.^{14/} See U.S. v. TOSCO Corp., 153 IBLA 205, 213 (2000), *aff'd*, Exxon Mobil Corp. v. Norton, 206 F.Supp. 2d 1085, 1090-91 (D. Colo. 2002).

B. FLPMA

In 1976, Congress enacted the FLPMA. Section 314 of FLPMA, 43 U.S.C. § 1744 (2000), among other things, requires the holder of an unpatented mining claim to file a copy of the official record of the location notice with BLM. 43 U.S.C. § 1744(b) (2000). It also required a mining claimant to file in the office where the location notice or certificate is filed a copy of either an affidavit of assessment work or a notice of intention to hold the claim, including any notice pertaining to suspension or deferment of annual assessment work or, as provided in 30 U.S.C. § 281 (2000), a detailed report of assessment work activities such as geological, geochemical, or geophysical surveys. 43 U.S.C. § 1744(a)(1) (2000). Failure to file the instruments described "shall be deemed conclusively to constitute abandonment" of the claim. ^{15/} 43 U.S.C. § 1744(c) (2000); U.S. v. Locke, 471 U.S. 83, 101-02

^{13/} 37 FR 17836 (Sept. 1, 1972).

^{14/} Even after a patent application has been submitted, annual assessment work must be performed until all acts required to entitle the claimant to a patent have been completed, *i.e.*, final entry has been made, the purchase price has been paid, and a certificate of purchase has been obtained, at which point the claimant is not thereafter required to perform assessment work. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892). The performance of annual labor precludes adverse claimants from initiating rights to a claim, but final certificate does not issue until the opportunity for filing adverse claims has expired.

^{15/} Patent applicants are relieved of the annual FLPMA filing requirement established
(continued...)

(1985); Estate of Steve Pedersen, 118 IBLA 210 (1991); Jack T. Kelly, 113 IBLA 280, 284 (1990).

C. The Rental Fee Act

On October 5, 1992, Congress adopted a different approach to unpatented mining claims. In lieu of the annual assessment work obligation imposed by the mining law, Congress substituted the requirement to pay an annual rental fee of \$100 for every unpatented claim, mill site, or tunnel site for each of the 1992-93 and 1993-94 assessment years. 30 U.S.C. § 28 (2000).^{16/} By its terms, the rental fee applied to unpatented oil shale claims as well, since the statute did not exclude them or make different provision for them.^{17/} In addition, Congress provided for a waiver of the rental fee for persons who qualified as small miners. The rental fee for both assessment years was due on or before August 31, 1993. If a mining claimant failed to timely pay the rental fees, the claim was conclusively deemed abandoned.

D. The EPA

On October 24, 1992, three weeks after the Rental Fee Act was enacted, Congress enacted the EPA. The EPA created a markedly different statutory scheme exclusively for oil shale claims. After that date, the requirements applicable to oil shale claims were to be derived from, and governed by, the EPA's provisions, while the Rental Fee Act continued to control all other mining claims. Thus, oil shale claims were to be maintained by paying \$550 "per claim per year," commencing with calendar year 1993. 30 U.S.C. § 242(e) (2) (2000).

^{15/} (...continued)

by 43 U.S.C. § 1744(a) (2) (2000) only after an application for a mineral patent that complies with 43 CFR Part 3860 has been filed and the final certificate has been issued. 43 CFR 3833.2-6; U. A. Small, 108 IBLA 102 (1989).

^{16/} The Interior Department and Related Agencies Appropriations Act of 1993 (Rental Fee Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992); 43 CFR Subpart 3833 (1993).

^{17/} In a companion case docketed as IBLA 99-10, this Board determined that oil shale claim holders subject to subsection (c) (1) and (2) of the EPA were required to pay the \$100 claim rental fee imposed by the Rental Fee Act for the 1993 and 1994 assessment years, failing in which the claims are properly deemed conclusively abandoned. Jerry D. Grover d.b.a. Kingston Rust Development (Grover IV), 160 IBLA 261 (2003).

E. The Maintenance Fee Act

On August 10, 1994, Congress did away with the rental fee and imposed an annual \$100 “claim maintenance fee” for each claim, mill site, or tunnel site. Such fee has been required for every assessment year since 1994.^{18/} 30 U.S.C. § 28f (2000), as amended. Failure to timely pay the maintenance fee conclusively constitutes a forfeiture rendering the claim null and void by operation of law. 30 U.S.C. § 28i (2000). However, consistent with the different treatment envisioned by Congress in enacting a separate statute for oil shale claims, the Maintenance Fee Act expressly states that its provisions “shall not apply to any oil shale claims for which a fee is required to be paid under section 2511(e)(2) of the Energy Policy Act of 1992 [citation omitted].” 30 U.S.C. § 28f (c) (2000).

V. Analysis

Turning to the question of which oil shale claims are subject to the \$550 fee, three classes of oil shale claim holders are enumerated in the EPA: those who had received First Half Final Certificate of patent prior to October 24, 1992; those who had filed an application for patent which was pending before the Department prior to October 24, 1992; and those who had not filed a patent application before October 24, 1992. Those in the second and third categories can receive only a limited patent for the oil shale and associated minerals, and they respectively will pay \$2.50 per acre and the fair market price per acre.

Claim holders who had an application pending as of October 24, 1992, and intend to pursue limited patent are required to maintain their claims prior to patent issuance “in accordance with the requirements of applicable law prior to enactment of this Act.” 30 U.S.C. § 242(c)(2) (2000). Thus, these persons would be subject to the requirements of the mining law as amended and FLPMA as they existed prior to the passage of the EPA on October 24, 1992.

Persons who had a patent application pending before the Department when the EPA was enacted could pursue the application to patent issuance, but were not irreversibly bound to do so. The Act permits such claim holders to relinquish the pending application and thereby place themselves in the same category as those who had not filed any application before the effective date of the Act. Pursuant to subsection (c)(3), claimants making this choice instead maintain their claims in the

^{18/} Omnibus Budget Reconciliation Act of 1993, as amended (Maintenance Fee Act), Pub. L. No. 103-66, 107 Stat. 405-06 (Aug. 10, 1993); Pub. L. No. 105-240, 112 Stat. 1570 (Sept. 25, 1998); Pub. L. No. 105-277, 112 Stat. 2681-235 (Oct. 21, 1998); Pub. L. No. 107-63, 115 Stat. 418 (Nov. 5, 2001); 43 CFR 3833.1-5(b), and 3833.1-7(d) (1994).

manner prescribed in subsection (e) (2), *i.e.*, by, among other things, paying the claim maintenance fee of “\$550 per claim per year.” 30 U.S.C. § 242(c) (3) (2000). However, so long as the oil shale claim holder actively pursues patent issuance, and BLM has taken no adverse action against the application for reasons relating to the sufficiency of the application as opposed to the validity of the oil shale claim, Grover I, 139 IBLA at 184, he is required to maintain the claim “in accordance with the requirements of applicable law prior to the enactment of [the EPA].” 30 U.S.C. § 242(c) (2) (2000).

[2] Subsection (d) (1) of the EPA, 30 U.S.C. § 242(d) (1), which governs the claims here at issue, establishes the circumstances and time within which a notice of election must be filed with the Department. Subparagraphs (A) and (B) thereof describe the nature of the choice before a mining claimant: either proceed to limited patent on the basis prescribed in subsection (e) (1), or maintain the claim in the manner required by (e) (2). A timely notice of election choosing one or the other course of action avoids the conclusive abandonment by operation of law specified by (d) (2). However, subsection (d) affords two discrete opportunities to relinquish pursuit of a patent application: at the point when the election notice was due (30 U.S.C. § 242(d) (1) (B)), and subsequently, by written notice to the Secretary at any point within the 2-year period during which the patent application must be filed to avoid abandonment by operation of law (30 U.S.C. § 242(d) (3)).

Subsection (d) of the EPA is thus a procedural mechanism for formally ascertaining and resolving the status of oil shale claims, but it does not abolish the basic necessity of maintaining possession of one’s claims as against the United States by complying with applicable law until such time as patent may be issued or the claim is otherwise invalidated. Indeed, the Senate Committee on Energy and Natural Resources plainly stated as much: “The Committee notes that claim holders electing to apply for a limited patent under this section must continue to maintain their claims prior to patent issuance in accordance with applicable law prior to enactment of the legislation.” S. Rep. No. 101-259 (1990) and S. Rep. No. 101-260 (1990) at 6 (emphasis added). Subsection (d) confers the right and opportunity to file an application for limited patent. It does not confer the unique exemption from applicable law that Grover seeks. The claim holder therefore must continue to maintain his claims during the 2-year period afforded by the statute. Our conclusion is confirmed by subsection (e) (2) of the Act, which by its terms is applicable to “a claim holder referred to in subsection (c) of this section or a claim holder subject to the election requirements of subsection (d) of this section who maintains or elects to maintain an unpatented claim,” and expressly requires the payment by these claim holders of “\$550 per claim per year.”

As we have shown above, the requirements for persons subject to subsection (c) are different, depending on whether the claim holder continues to

actively pursue the patent for which he has submitted an application. If he does, under 30 U.S.C. § 242(c) (2) he maintains the claim in the manner provided by applicable law prior to the enactment of the EPA. If he does not pursue the patent for which he has applied, under 30 U.S.C. § 242(c) (3) he maintains his claim “in accordance with the requirements set forth in subsection (e) (2) of this section in lieu of receiving patent.” Thus, “a claim holder referred to in subsection (c)” perforce means the claim holder who chooses not to pursue his patent application as described in subsection (c) (3).

[3] The persons subject to the election provisions of subsection (d) are those who maintain or elect to maintain unpatented claims who are not described in or subject to subsection (b) or (c) (1) and (2). Again, however, all persons hold unpatented mining claims by timely fulfilling the conditions prescribed to maintain the claims, and this they must do, regardless of whether, in the case of an oil shale claim, they intend to file a patent application in the future or may at some later point choose not to pursue such a course of action. We therefore conclude that the phrase “maintains or elects to maintain unpatented claims,” while structured to track the elective aspects of the EPA in describing claim holders not covered by subsections (b) and (c) (1) and (2), neither negates the fundamental necessity of maintaining one’s possessory right by complying with the law, nor creates an exception to that rule.

[4] Congress has, of course, altered the manner of maintaining oil shale claims in important ways. Thus, while subsection (e) of the EPA, 30 U.S.C. § 242(e) (2) (2000), affirms that subsection (c) (3) and (d) claim holders “shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this section.” It also states that, notwithstanding any other provision of law, “the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary \$550 per claim per year.” (Emphasis added.) Accordingly, we hold that subsection (e) (2) requires that oil shale claims for which an election to proceed to limited patent has been filed must be maintained in accordance with the mining law, FLPMA, and with the EPA, until such time as patent may be issued, including during the 2-year period before the deadline for filing the application expires.

[5] Turning to the consequence of not paying the annual claim fee, Grover argues that failure to pay the fee does not result in claim abandonment or forfeiture by operation of law, and further argues that this Board so held in Grover I, 139 IBLA at 178. BLM contends that the obligation to “maintain such claims by complying with the general mining laws of the United States,” 30 U.S.C. § 242(e) (2), establishes Congress’ intent to require forfeiture as the penalty for failing to comply.

The EPA imposes the obligation to pay \$550 “per claim per year” to maintain an oil shale claim, and specifies that the payment shall accompany annual FLPMA

filings.^{19/} Congress did not expressly provide for the consequence of a default in the annual payment obligation.^{20/} It therefore falls to this Board to determine whether a default in the obligation to “maintain such claim by complying with the general mining laws * * * and with the provisions of this section [242]” is without practical consequence as Grover argues. In other words, we must determine whether the obligation to pay the \$550 fee “per claim per year” is mandatory, as BLM asserts, or permissive, as Grover suggests.

We commence the discussion with the following observation regarding whether a statute is mandatory or merely directory in nature:

No statutory provisions are intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. [Citation omitted.] In doing so, they must consider the importance of the literal observance of the provision in question to the object of the legislation. If the provision is essential, it is mandatory. A departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it. As a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes permissive. [Citation omitted.] It has been held that to distinguish between mandatory and directory language, the court may look to the purposes of the statute and the equities inherent in the construction chosen.

3 Singer, Sutherland Statutory Construction § 57:1 at 4-5 (6th ed. 2001 Rev.).

Other principles guide our inquiry: “‘shall’ is considered presumptively mandatory unless there is something in the context or character of the legislation which requires it to be looked at differently.” Id., § 57:2 at 7; see Reeves v. Andrus,

^{19/} FLPMA filings are due on or before Dec. 30 of each year. In its regulations, BLM has specified that the claim fee for oil shale claims is due on or before Dec. 31 of the calendar year. See 43 CFR 3833.1-5(e).

^{20/} We acknowledge that the specification of a consequence generally demonstrates that a statutory prescription is mandatory, and that the fact that no consequence is specified for noncompliance may lead to the conclusion that a requirement is directory. “[T]his is only an element to be considered, and is by no means conclusive,” however. 3 Singer, Sutherland Statutory Construction § 57:8 at 34, 35 (citation omitted) (6th ed. 2001 Rev.); compare Ute Indian Tribe of the Uintah and Ouray Reservation, Utah v. Hodel, 673 F. Supp. 619, 621 (D. D.C. 1987) (traditionally “shall” indicates a mandatory, nondiscretionary duty, but a court “may always investigate beyond ‘ritualistic incantation’ of this standard rule”).

465 F. Supp. 1065, 1069 (D. Alaska 1979) (“‘shall’ is mandatory unless the discretionary character of the statute clearly appears”), citing Minor v. The Mechanics’ Bank of Alexandria, *infra*. Legislative intent should control. 3 Singer, Sutherland Statutory Construction § 57:1 at 9 (6th ed. 2001 Rev.); Minor v. The Mechanics’ Bank of Alexandria, 26 U.S. 47, 55 (1 Pet.) (1828) (“may” is often properly construed as “imperative” where the legislature means to impose a “positive and absolute duty, and not merely to give a discretionary power;” thus, the “ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions”). As this Board observed in Grover II, 141 IBLA 322, in enacting the EPA, Congress intended to take action to resolve disputes regarding the validity of oil shale claims located over 72 years ago in Colorado, Utah, and Wyoming, and to bring finality to outstanding claims as to which claimants had taken little or no action to develop them. H.R. Rep. No. 102-474 (VIII), 102nd Cong., 2d Sess. 89 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2307-8. One of the ways Congress chose to accomplish its purpose was to require the \$550 fee per oil shale claim per year as an element of maintaining the possessory right to the claim against the United States.

In this case, to adopt Grover’s view that Congress established a claim fee to maintain an oil shale claim and yet intended no consequence for a default therein would be to utterly frustrate Congress’ purpose and intention.^{21/} To the contrary, however, “it is always presumed that the legislature was motivated by some purpose in the enactment of a statute, so that if one construction would render it ineffective, the other manifestly should be adopted.” 3 Singer, Sutherland Statutory Construction § 57:2 at 26-27 (6th ed. 2001 Rev.). Therefore, if payment of the \$550 fee per claim per year is for prescribed claim holders a necessary condition to maintain possession of the claim against the United States, then manifestly a failure to pay such fee must cause the claim to be lost. Moreover, this conclusion is in complete harmony with the “general course of legislative policy” expressed in the 1993 Act and Omnibus Act regarding other mining claims on the public lands. *See Earl Williams*, 140 IBLA 295, 304 (1997), *aff’d Bedroc Ltd. L.L.C. v. U.S.*, 50 F. Supp. 2d 1001 (D. Nev. 1999), *aff’d*, 314 F.3d 1080 (9th Cir. 2002), *citing* 2A Singer, Sutherland Statutory Construction § 46.05 (5th ed. 1992).

[6] We hold that the obligation to pay \$550 per claim per year to maintain an oil shale claim is mandatory in nature, that payment of the fee is a substantive matter which is the “essence of the thing to be accomplished,” 3 Singer, Sutherland Statutory Construction 57:2 at 10 (citation omitted), and that interpreting the EPA so that no consequence flows from the failure to comply with the obligation after notice and a

^{21/} See n. 24 *post*e.

reasonable opportunity to do so is an absurd result that obliterates the essence of the provision and purpose for which the statute was enacted:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. [Citations omitted.] When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. [Citations omitted.] Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with policy of the legislation as a whole” [citations omitted] this Court has followed that purpose, rather than the literal words.

U.S. v. American Trucking Associations, 310 U.S. 534, 543 (1939). See also U.S. v. Locke, 471 U.S. at 93 (“we will not allow a literal reading of a statute to produce a result ‘demonstrably at odds with the intentions of its drafters,’” citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); Lawson v. Suwannee Fruit and Steamship Co., 336 U.S. 198, 201 (1949); Exxon Corp., 97 IBLA 45, 61, 94 I.D. 139, 148 (1987), aff’d 730 F. Supp. 1535 (D. Wyo. 1990), aff’d 970 F.2d 757 (10th Cir. 1992); Sonat Exploration Co., 105 IBLA 97, 114 (1988); McNabb Coal Co. v. OSM, 101 IBLA 282, 289 (1988). We conclude that the \$550 fee requirement is not merely a matter of convenience, but is instead a substantive matter essential to maintaining the possessory right to an oil shale claim as against the United States, and thus it is mandatory. In so holding, we interpret the provision “with common sense in order to accomplish a reasonable result.” 3 Singer, Sutherland Statutory Construction § 57:3 at 16 (citation omitted); see also U.S. v. Ryan, 284 U.S. 167, 175 (1931) (“All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose” (citations omitted)). On this basis, we further hold that failure to maintain an oil shale claim by paying the \$550 fee per claim per year established by the EPA subjects the claim to forfeiture.

We turn now to the default and Grover’s sixth argument, which we will examine in connection with his first argument. In spite of the mandatory nature of the oil shale maintenance fee, Grover contends that no fees can be demanded for the years 1993 through 1997, the period during which the appeals of BLM’s initial decisions were pending, because there was no obligation to perform assessment work so long as the claims were void, and that a claim holder cannot “go back in time” to

perform assessment work. (SOR at 3.)^{22/} Hence, Grover argues, there can be no accruing obligation to pay the fees which Congress has established in lieu of performing assessment work. (SOR at 1-3, 7-8.)^{23/}

[7] Grover did not seek a stay of BLM's decisions voiding the claims, and so they were effective as of the close of the appeal period, and, in accordance with BLM's decisions, the claims were voided and ceased to exist. Sigma M Explorations, Inc., 145 IBLA 182, 198 (1998). In that circumstance, allowing a claimant to perform assessment work or pay maintenance fees would constitute an action directly contrary to, and inconsistent with, the Government's conclusion that a claim is a nullity. See Andrew L. Freese, 50 IBLA 26, 35, 87 I.D. 395, 399 (1980) (assessment work deferral); see also Cameron Anderson, 143 IBLA 7, 7 (1998); Lenore L. Baird, 142 IBLA 335, 336 (1998); Michael Haggerty, 142 IBLA 104, 105 (1997); Gordon B. Copple, 105 IBLA 90, 94 n. 4, 95 I.D. 219, 222 n. 4 (1988). Grover is therefore correct that there was no requirement to perform assessment work or pay fees during the pendency of his appeals. However, these appeals arise under the EPA and do not involve an obligation to perform assessment work. The question to be answered is whether Congress contemplated permanently relieving oil shale claimants of the obligation to maintain their claims by paying the \$550 fee per claim per year because they invoke their right to administrative review of a BLM decision.

The maintenance fee obligation in the EPA is to pay "\$550 per claim per year." Nothing in that plain language of the EPA provides a legitimate basis for concluding that Congress intended to relieve a claim holder of the fee requirement for a reason not enumerated in the Act itself. Grover's argument depends entirely on his assumption that, because the obligation to perform assessment work does not accrue while an appeal is pending, claim maintenance fees cannot accrue. This assumption is misguided in that it completely ignores the plain statutory language of the EPA, which has no counterpart in other mining statutes.

^{22/} Contrary to Grover's argument, we note that when assessment work is deferred and the deferral period ends, the claim holder does indeed perform the assessment work accrued from years past, while also performing the current year's obligation. 43 CFR 3852.5.

^{23/} Grover further contends that IM 98-01 on its face does not pertain to oil shale placers, and therefore reasons that, as a substantive matter, it could never apply. IM 98-01 refers to the "maintenance fee statute" and it twice refers to the "\$100 maintenance fee or small miner waiver." These references demonstrate that the IM does not pertain to oil shale claims or the EPA, and, as we have pointed out, the Omnibus Act, as amended, expressly excludes oil shale claims which are subject to the payment provisions of the EPA. 30 U.S.C. § 28f (c) (2000). While technically correct, the argument is irrelevant. See also p. 24 ante.

[8] With this Board's reversal of BLM's original 1997 decision declaring Grover's mining claims void, the effect of the reversed decision was a nullity. The mining claims therefore were fully restored, as if the decision had never been issued, and the obligation to pay "\$550 per claim per year" in order to maintain the possessory right to them against the United States was fully resurrected *nunc pro tunc*. Accordingly, BLM correctly notified Grover that \$550 per claim per year was due for each year the claim existed. He did not pay the fees. Grover's suggestion that the reversed voidance decision relieved him of the obligation to pay "\$550 per claim per year" to maintain the claims assumes the EPA contains an implicit exception to that statutory requirement based on the pendency of administrative proceedings. It does not. We have found nothing in the EPA, its legislative history, or in what we have discerned of Congress' understanding of the unique niche in mining on the public lands occupied by oil shale claims,^{24/} that would justify accepting Grover's argument that he is forever relieved of the mandate to pay such fees merely by filing an appeal. What there is in the way of legislative history, leads us, aided by established principles of statutory construction, to conclude that such an argument must be rejected as contrary to common sense and to the underlying purposes of the EPA. Thus, it is clear that Congress intended for oil shale mining claimants to pay "550 per claim per year." Grover declined to do so. There is no exception for any particular year, or any particular event.

[9] While we are certain that Congress intended oil shale claims to remain subject to voidance when not maintained in compliance with the law, we do not find that Congress mandated the self-executing conclusive abandonment or forfeiture by operation of law that attends other defaults in other circumstances. Subsection (d) of the EPA specifies conclusive abandonment by operation of law only for failure to timely file a notice of election, failure to timely file an application for limited patent, failure to timely notify the Department of a subsequent decision to maintain the claim

^{24/} Whereas all other holders of mining claims have been held to full and timely compliance with the assessment work requirements to maintain possession of their claims as against rival mining claimants and the United States, for much of the last century oil shale claimants did not have to perform annual labor at all to maintain possession of their claims against rival claimants or even the United States. Even when the law on the point changed, oil shale claimants had the benefit of a more lenient substantial compliance standard. Unlike other mining claimants, oil shale claimants were able to hold their claims for decades while making little or no effort to develop and exploit their mineral value, the very *sine qua non* of the general mining law. What little legislative history there is shows that Congress was fully aware of the uneven treatment of unpatented oil shale claims compared to other unpatented claims, and it shows that the EPA was animated by Congress' desire both to clear the public lands of stale, undeveloped oil shale claims, and to induce specific action among oil shale claimants.

instead of pursuing patent, and by reference to them, the failure to timely file FLPMA instruments. Indeed, amendments before the House had expressly proposed a self-executing conclusive abandonment for failure to pay the yearly maintenance fee, but such a provision manifestly was rejected in the final legislative draft. See Grover I, 139 IBLA at 183 n.1. The decisions are therefore modified to the extent that they employ nomenclature that suggests or states any such automatic, self-executing consequence for default.

This Board in general adheres to the view that forfeitures are to be strictly construed. Thus, we have held that the penalty of a self-executing forfeiture must be stated in the authorizing statute and may not be imposed via an implementing regulation.^{25/} Grover I, 139 IBLA at 184. See also Topaz Beryllium v. U.S., 649 F.2d 775, 778 (10th Cir. 1981); ^{26/} Jack Kettler, 68 IBLA 301, 304 (1982); Harvey A. Clifton, 60 IBLA 29, 34 (1981) (citing 3 Sutherland Statutory Construction §§ 59.02,

^{25/} Grover relies on the ruling in Grover I, 139 IBLA at 184, to support his argument that nothing in the CFR properly provides for the abandonment or forfeiture of oil shale claims for failure to pay the \$550 fee. (SOR at 4.) It is correct that we noted that the authority to forfeit an oil shale claim was based on 43 CFR §§ 3833.1-5 and 3833.4(a)(2) (1993), each of which circled back to the other, rather than to a provision in the EPA. That is far from holding that the failure to pay the claim fee cannot result in loss of the claim. We never reached that question, because what was at issue in that case was whether claim holders described in 30 U.S.C. § 242(c)(1) are required to maintain their claims by paying the \$550 fee. Subsection (c)(2) clearly states that they are not, and we held no more than that. Grover I, 139 IBLA at 184. We reach that question here, as articulated above.

^{26/} Topaz Beryllium concerned regulations implementing section 314 of FLPMA, 43 U.S.C. § 1744 (2000). Among other issues, the requirement of a \$5 service fee was challenged. Topaz Beryllium Co. V. United States, 479 F. Supp. 309, 314 (D. Utah 1979). On appeal, the Ninth Circuit confirmed the Department's statutory authority to promulgate various requirements to achieve FLPMA's purposes. Moreover, the court found that failure to comply with those requirements imposed solely by regulation could be treated as a "curable defect:"

A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." The Secretary does not contemplate any automatic extinguishment of a claim for faulty filing.

649 F.2d at 778. The court thus sustained the Secretary's authority to promulgate regulations that provided for forfeiture for failing to cure a curable defect. In this case, the oil shale claim fee that must accompany the FLPMA filing is required by statute, not merely by regulation, a far stronger basis for invoking forfeiture when a claim holder fails to pay fees after notice to do so.

59.03 (4th ed. 1974). Under this Board's precedents, where a statute does not provide for automatic forfeiture, the appropriate course of action is to provide a party an opportunity to comply with the law, in essence an opportunity to "cure" the noncompliance. Grover I, 139 IBLA at 184. In this case, Grover was provided written notice and a reasonable opportunity to avoid losing his claims by paying accrued claim fees. When he did not do so nearly 6 months after receiving BLM's notice, BLM properly issued a decision adjudicating the claims null and void by reason of his noncompliance with the provisions of subsection (e) (2) of the Act. ^{27/}

The remaining argument to be disposed of is the alleged insufficiency of BLM's legal description of UMC 115432, 115443, and 115453 in IBLA 99-9. As noted above, Grover proffers three amended location notices dated June 19, 1991. These, as BLM states, should have been promptly submitted to BLM so that it could determine the merits of his contention. If the issue remains viable after receipt of this opinion, Grover should tender his location notices to BLM for adjudication.

To the extent not explicitly addressed, all other arguments have been considered and rejected.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to consolidate is granted, the decisions in IBLA 99-8 and IBLA 99-9 are affirmed, the Board's de

^{27/} Even if viewed from the perspective that the Department possesses no more authority to adjudicate a default than it had with respect to the annual assessment work the fee replaced, it is clear that after 1970 the Department had the authority to declare an oil shale mining claim a nullity by reason of a substantial default in performing annual labor, so that it possesses like authority to declare a claim null and void for a default in paying the annual fee that replaced annual assessment work. See, e.g., Exxon Mobil Corp. v. Norton, 206 F. Supp. 2d 1085, 1095 (D. Colo. 2002); U.S. v. Hix, 136 IBLA 377 (1996); U.S. v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981), aff'd, Civ. No. 82-2112 (C.D. Cal. 1984); U.S. v. Weber Oil Co., 68 IBLA 37, 89 I.D. 538 (1982), rev'd sub nom. Equity Oil Corp. v. Hodel, Civ. No. 83-F-1837 (D. Colo. Nov. 19, 1985); dismissed as moot, 826 F.2d 948 (10th Cir. 1987).

Compliance with the annual assessment requirement frequently arises in contest proceedings or proceedings to "cancel" the claim which allege other grounds for challenging the claims. See, e.g., Union Oil Co. of California, 98 IBLA 37 (1987); U.S. v. Koenigsmark, 53 IBLA 377 (1981). However, where, as here, the case involves only the application of the law to the established failure to pay the annual fee after notice and a reasonable opportunity to do so, neither a contest proceeding pursuant to 43 CFR 4.451 nor a hearing pursuant to 43 CFR 4.415 is appropriate, because there is no disputed issue of fact.

novo review authority is exercised in IBLA 99-11 and IBLA 99-12, and those decisions are affirmed as modified herein.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge

UMC 115424 et al.

IBLA 99-8
Exhibit A
by UMC#

115424	115485	115617	115765
115425	115486	115618	115766
115426	115487	115619	115767
115427	115488	115621	115768
115428	115489	115622	115770
115429	115490	115635	115771
115430	115491	115636`	115776
115431	115494	115637	115777
115433	115495	115638	115778
115434	115496	115643	115779
115438	115497	115644	115780
115439	115498	115646	115781
115440	115499	115647	115782
115441	115500	115648	115811
115442	115501	115649	115812
115444	115502	115650	115813
115445	115503	115651	115814
115446	115504	115652	115815
115447	115505	115653	115816
115448	115506	115654	115817
115451	115507	115743	115818
115454	115508	115744	115819
115456	115526	115745	115821
115457	115528	115746	115822
115458	115530	115747	115823
115459	115531	115748	115826
115460	115532	115749	115827
115462	115533	115750	115828
115463	115534	115751	115829
115473	115535	115752	115830
115475	115536	115753	115832
115476	115537	115754	115833
115477	115598	115755	115835
115478	115600	115756	115836
115479	115611	115757	115837
115480	115612	115758	
115481	115613	115759	
115482	115614	115760	
115483	115615	115761	
115484	115616	115762	

UMC115763 et al.

IBLA 99-11 EXHIBIT A

115763 115764 115769 115772 115773
115774 115775

UMC 115432 et al.

I B L A
99---9
EXHIBIT
A A

Portions of the following claims are located on land over which the Bureau of Land Management, Department of the Interior does not have jurisdiction.

<u>UMC#</u>	<u>CLAIM NAME</u>	<u>DATE OF LOCATION</u> <u>LOCATION OF CLAIM</u>	<u>LAND ACTION</u>
115432 Apache No 9		05-01-18 T11SR11E, SLM	NE%NE`/. State land State Selection 3 01-16-43
115443 Victor No 5		02-05-18 T11SR11E, SLM Sec 2: part of Lots 3 & 4 Part of Secs. 3, 4, 9 & 10	Sec 2; part of Lots 3&4- State Land Patent 43-64-0062 dated 04-27-64 and title passed 01-21-21
115453 American No 9		12-10-18 T10SR11E, SLM Sec 35:SE`/. & Sec 36: part of Lot 4 T7SR7W, USM Sec. 2: part of Lot 1	Sec. 36: part of Lot 4- State Land Patent 43-64-0031 dated 01-06-63 & title passed 01-21-21
115461 Walters Claim #6		05-10-18 T11SR11E, SLM Sec.24: NW1/.	NW%NW`/.-State Land State Selection 8 03-01-45
115560 Provo No. 6		05-10-18 T11SR11E, SLM Sec. 14: SE%	SE`/.SE`/.-State Land State Selection 3 01-16-43
115511 Provo No. 10		05-01-18 T11SR11E, SLM Sec 14: SW"/.	W`/2SW%-State Land State Selection 3 01-16-43
115820 Liberty No. 5		01-01-19 T1 1SR1 1E, SLM Sec. 12: NW`/.	NW`/.NW`/.-State Land State Selection 8 03-01-45

January 22, 2004

IBLA 99-8, 99-9, 99-11, 99-12	:	UMC 115424, <u>et al.</u> ; 115432, <u>et al.</u> ;
	:	UMC 115763, <u>et al.</u> ; UMC 115452
	:	
JERRY D. GROVER, D.B.A.	:	Mining Claim Maintenance Fees,
KINGSTON RUST DEVELOPMENT	:	Mining Claims Void Ab Initio
(GROVER III)	:	
	:	
160 IBLA 234 (2003)	:	

ERRATUM

Five lines were dropped from the text of the opinion at the top of page 243 in the course of processing the decision for issuance and service on the parties. The dropped text, which quotes a portion of the Energy Policy Act, 30 U.S.C. § 242(d) (2000), reads as follows:

(d) Election

(1) Notwithstanding any other provision of law, within 180 days from the date of which the Secretary provided notice under subsection (a) of this section, a holder of a valid oil shale mining claim

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge

Editor's Note: The appearances list was intentionally omitted.

IBLA 99-8, 99-9, 99-11, 99-12